View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Institutional Knowledge at Singapore Management University

Singapore Management University

Institutional Knowledge at Singapore Management University

Research Collection School Of Law | School of Law

7-2014

Singapore's New Discretionary Death Penalty for Drug Couriers: Public Prosecutor v Chum Tat Suan

Siyuan CHEN

Singapore Management University, siyuanchen@smu.edu.sg

DOI: https://doi.org/10.1350/ijep.2014.18.3.456

Follow this and additional works at: https://ink.library.smu.edu.sg/sol_research

Part of the Asian Studies Commons, Evidence Commons, Human Rights Law Commons, and the State and Local Government Law Commons

Citation

CHEN, Siyuan. Singapore's New Discretionary Death Penalty for Drug Couriers: Public Prosecutor v Chum Tat Suan. (2014). *International Journal of Evidence and Proof*. 18, (3), 260-266. Research Collection School Of Law.
Available at: https://ink.library.smu.edu.sg/sol_research/1260

This Journal Article is brought to you for free and open access by the School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email libIR@smu.edu.sg.

Published in International Journal of Evidence and Proof, 2014, 18 (3), 260-266
http://doi.org/10.1350/ijep.2014.18.3.456

Keywords: Misuse of Drugs Act; Drug trafficking couriers; Presumption of innocence; Discretionary death penalty; Singapore

Singapore's New Discretionary Death Penalty for Drug Couriers
Public Prosecutor v *Chum Tat Suan* [2013] SGHC 221

Background

Singapore has always adopted an uncompromising stance against drug trafficking. Harsh punishments – ranging from caning and imprisonment to the death penalty – have largely been justified on the policy grounds that drug addiction has the demonstrable potential to destroy the fabric of society, break up families, and cause addicts to turn to violent crime to feed their addiction.[1] These punishments are coupled with a series of presumptions built into the Misuse of Drugs Act (MDA),[2] designed to thwart the efforts of drug syndicates from around the region to smuggle their merchandise into Singapore. For instance, under s. 18 of the MDA, any person who is found with controlled drugs is presumed to have had that drug in his possession and also presumed to have known the nature of that drug.[3] In addition, under s. 17, if the controlled drugs in question exceed a certain quantity, there is a presumption that it is for the purpose of trafficking. A successful conviction for drug trafficking could, depending on the quantity trafficked set out in the charge, lead to the mandatory death penalty.[4] Human rights and constitutional challenges have been mounted against the MDA over the years, but none of them have ever succeeded in court.[5]

Perhaps in a bid to 'draw a very careful, calibrated distinction between the different levels of accountability' between kingpins and mules in drug syndicates, and to 'temper and mitigate the harsh drug laws with compassion', the MDA was amended in 2012.[6] One of the changes was the introduction of s. 33B, which gives any judge hearing a capital drug trafficking case the discretion to impose a sentence of life imprisonment[7] and caning instead of the death penalty for low-level drug operatives if two conjunctive conditions are met.[8] First, the accused must prove, on a balance of probabilities, that his role in the offence (of drug

* I would like to thank my students Al-gene Tan Qing Wei and Jerome Yang Zhelun for their invaluable comments and research rendered for this piece, though any errors remain mine.

[1] Second Reading of Misuse of Drugs (Amendment) Bill, *Singapore Parliament Reports*, 12 November 2012.

[2] Chapter 185, Revised Edition 2008.

[3] For a commentary on these presumptions, see C. Siyuan and N. Khng, 'Possession and Knowledge in the Misuse of Drugs Act' [2012] 30 *Singapore Law Review* 181.

[4] See ss. 5, 7 and 33 and the Second Schedule of the MDA.

[5] See generally C. Siyuan, 'A Preliminary Survey of the Right to Presumption of Innocence in Singapore' (2012) 7 LawAsia Journal 78; C. Siyuan, 'The Limits on Prosecutorial Discretion in Singapore: Past, Present, and Future' (2013) 2(1) International Review of Law 1.

[6] Second Reading of Misuse of Drugs (Amendment) Bill, *Singapore Parliament Reports*, 12 November 2012 (Edwin Tong). One of the recurring criticisms by opponents to the mandatory death penalty is that more often than not, the traffickers arrested are the 'mules' rather than the masterminds of drug syndicates. *Yong Vui Kong* v *Public Prosecutor* [2010] 3 SLR 489 was one such case.

[7] For a commentary on the meaning of 'life imprisonment', see C. Siyuan, 'The Meaning of 'Life Imprisonment' in the Context of a Presidential Commutation Order' March/2012 *Singapore Law Watch Commentaries*.

[8] Second Reading of Misuse of Drugs (Amendment) Bill, *Singapore Parliament Reports*, 12 November 2012 (Teo Chee Hean).

trafficking) was restricted to that of a courier within his drug syndicate;[9] and second, the prosecution must certify that the accused had substantively assisted the Central Narcotics Bureau (CNB) in disrupting drug trafficking activities within or without Singapore.[10] Before the 2012 amendments, an accused facing a capital trafficking charge was already in an unenviable position. But did the amendments make matters more difficult? The High Court in *Public Prosecutor* v *Chum Tat Suan*[11] thought so. Notably, this was only the second case to have considered and applied s. 33B of the MDA.[12]

Decision in *Chum Tat Suan*

The accused was charged with importing 94.96 grams of diamorphine into Singapore.[13] His main defence was that the bag (which contained the drugs) found in the boot of the taxi he was in was not his. He also maintained that in any event, he did not know what was in the bag. The judge did not believe this defence and convicted him, and s. 33B of the MDA was triggered. The judge sought submissions for the separate hearing on sentencing and the parties returned with a jointly agreed proposal.[14] According to that proposal, the judge must first determine if the accused was indeed a courier; if the answer is no, the mandatory death penalty ensues. If the answer is yes, the prosecution would – presumably after seeking an adjournment of the hearing – record a statement from the accused so that the prosecution can decide if it wishes to certify that the accused had substantively assisted CNB in disrupting drug trafficking activities within or without Singapore. If the prosecution so certifies, the judge would then decide if the death penalty or life imprisonment and caning is the more appropriate punishment.[15] The judge described this proposal as giving rise to a 'significant difficulty'.[16] He explained:[17]

> I have already convicted the accused on the basis of findings of fact that I have made. But now I have to make new findings … for the purposes of sentencing … If I allow parties to introduce new evidence … there is the possibility of evidence emerging that might undermine the findings of facts that I had earlier made in convicting the accused. There is even the possibility of evidence emerging that casts doubt on the guilt of the accused. On the other hand, if I do not allow the introduction of any new evidence … there is a possibility of prejudice to the accused, in that he might have

[9] 'Courier' is not used in the MDA; the actual words used are 'transporting, sending or delivering' controlled drugs. It was also clarified in Parliament that s. 33B would not extend to accused persons who have packed or stored the drugs: Second Reading of Misuse of Drugs (Amendment) Bill, *Singapore Parliament Reports*, 14 November 2012 (Teo Chee Hean).

[10] Alternatively, it is open to the accused to prove (under the second condition), also on a balance of probabilities, that he was suffering from an abnormality of mind to that extent that it had substantially impaired his mental responsibility This is known as the defence of diminished responsibility, which under the Penal Code (Chapter 224, Revised Edition 2008) is a specific defence to culpable homicide.

[11] [2013] SGHC 221. The High Court is the second-highest court in Singapore, after the Court of Appeal. It should be noted that the judge who heard this case also heard *Public Prosecutor* v *Abdul Kahar bin Othman* [2013] SGHC 222, which also dealt in part with the same issues. The two judgments were released on the same day.

[12] The first was *Public Prosecutor* v *Abdul Haleem bin Abdul Karim* [2013] 3 SLR 734, but issues relating to evidence did not arise.

[13] See *Public Prosecutor* v *Chum Tat Suan* [2013] SGHC 150.

[14] *Public Prosecutor* v *Chum Tat Suan* [2013] SGHC 221 at [4].

[15] An additional step was actually proposed: if the prosecution declines to certify, both parties would proceed to make submissions on whether the accused nonetheless was suffering from an abnormality of mind at the material time.

[16] *Public Prosecutor* v *Chum Tat Suan* [2013] SGHC 221 at [5].

[17] Ibid.

> conducted his defence in such a manner as to furnish no occasion for evidence of his being no more than a 'courier' to emerge at trial …

The judge further noted that the alternative approaches to either decide issues of conviction and sentence together or to have the sentencing submissions to be based only on the evidence adduced at trial would put the accused 'in a bind':[18]

> [I]n order to make the claim that he was no more than a 'courier', the accused must first admit that he was trafficking or importing or exporting drugs. Choosing not to admit this might subsequently preclude him from arguing that he was no more than a 'courier' should the court convict him nonetheless. For instance, if the accused elects to remain silent because he is of the opinion that the prosecution has not made out a case against him, and the court convicts him anyway, he would not have had the opportunity to give evidence for the purposes of proving that he was no more than a 'courier'. If his case was that he did not know that he had drugs in his possession, or that he had them in his possession for his own personal consumption … it would be difficult or impossible for him to argue that he was no more than a 'courier'. One response might be that the accused must take a position and stick with it. But the onus is not on the accused to take positions … This must especially be so when the punishment sought to be visited on the accused is the sentence of death.

The judge eventually held that on the basis of the evidence presented at the trial that led to the accused's conviction, the accused was no more than a courier.[19]

Analysis

Without saying as much, the judge in *Chum Tat Suan* must have been referring to the privilege against self-incrimination and concomitantly, the right to presumption of innocence.[20] On his analysis, an accused drug courier can probably only avail himself of s. 33B of the MDA if he had in some way confessed to liability before or during the trial – how else can he satisfy the first requirement of being just a courier in the drug syndicate? The usual defences raised by persons accused of drug trafficking would be to either deny knowledge of the existence of the drugs that are found on them or their belongings, or to deny knowledge of the contents of what they were told to traffic – these were the defences raised in *Chum Tat Suan*; this also explains why the presumptions in s. 18 of the MDA exist. It is also possible for an accused to remain silent, but under s. 261 of the Criminal Procedure Code,[21] if he raises a defence at trial that was not raised when he was charged, adverse inferences may be drawn as regards his guilt.[22]

All things considered, if an accused drug courier wants to maximise his chances of escaping the gallows and at the same time avoid the evidential guillotine highlighted by the judge in *Chum Tat Suan*, he essentially has two options. If he is caught with a huge quantity of drugs

---

[18] Ibid at [6].

[19] Ibid at [7]. It appears that the decision as to whether the death penalty was nonetheless appropriate was not made in this judgment.

[20] On the connection between the two see M. Menlowe, 'Bentham, Self-Incrimination and the Law of Evidence' (1988) 104(2) Law Quarterly Review 286 at 303–306; A. Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10(4) International Journal of Evidence & Proof 241 at 255–256;

[21] Chapter 68, Revised Edition 2012.

[22] However, adverse inferences cannot be used to bolster an otherwise evidentially weak case: *Took Leng How* v *Public Prosecutor* [2006] 2 SLR(R) 70 at [43].

and a conviction upon the likely charge may result in the death penalty, short of him having robust defences against the statutory presumptions against him, he will probably want to admit that he is part of a drug syndicate before he is convicted and hope he is found to have rendered substantial assistance to the CNB so that s. 33B of the MDA can be successfully invoked. On the other hand, if he is unsure that the likely charge may result in the death penalty, he may try to strike some kind of bargain with the prosecution beforehand that the quantity of drugs he is charged with trafficking does not trigger the death penalty. But for both options, he is required to plead guilty at some point, while the prosecution holds all of the cards.

A Member had raised this concern when the 2012 amendments to the MDA were debated in Parliament. He asked if accused drug couriers 'will be pressurised into incriminating themselves' in the calculated hope of avoiding the death penalty.[23] In response, the Minister for Law said: 'if the accused knows something, and has to decide between trying to run a false defence that he knows nothing, and telling the truth and assisting the CNB – I do not think Members will argue against giving him an incentive to tell the truth, to help us, and to help himself.'[24] This response, of course, is generally consistent with Singapore's subscription to the 'crime control' model of criminal justice, which prioritises successful convictions over procedural rights.[25] It is also generally consistent with the philosophy espoused by the courts: for instance, the Court of Appeal has ruled that the right to silence (which overarches the privilege against self-incrimination)[26] is neither a rule of natural justice nor a constitutional right,[27] while the High Court has ruled that the right to silence is an impediment to an accused establishing whatever defence he has in a timely manner.[28] In perspective, however, the right to silence has largely been modified or abrogated in other jurisdictions as well; one commentator describes the right as only being 'theoretically intact' in England.[29] Be that as it may, the fact that an accused drug courier now has an additional disincentive to remain silent is, at the very least, another step away from his basic right to presumption of innocence. Moreover, jurisdictions that have abolished or come close to abolishing the right to silence may not have laws carrying the death penalty.

Then there is the matter of extending prosecutorial discretion that was not directly addressed by the court in *Chum Tat Suan*. Quite apart from the problem of having the prosecution certify substantial assistance only after the conviction, there is the prior question of whether it should even be the prosecution that does this certification. While it is true that a sub-section in s. 33B of the MDA allows the certification decision to be challenged on the grounds of bad faith or malice, recent case law has confirmed that any challenge of prosecutorial discretion involves a few hurdles.[30] First, there is always a presumption that the prosecution has exercised prosecutorial discretion in accordance with the law. Second, the burden is on the accused to adduce (prima facie) evidence of any improper exercise of prosecutorial

[23] Second Reading of Misuse of Drugs (Amendment) Bill, *Singapore Parliament Reports*, 12 November 2012 (Eugene Tan).
[24] Second Reading of Misuse of Drugs (Amendment) Bill, *Singapore Parliament Reports*, 14 November 2012 (K Shanmugam).
[25] See generally M. Chng, 'Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010' (2010) 23(1) Singapore Academy of Law Journal 23.
[26] A. Keane and P. McKeown, *The Modern Law of Evidence*, 9th edn (Oxford University Press: 2012) 409.
[27] *Public Prosecutor* v *Mazlan bin Maidun* [1992] 3 SLR(R) 968 at [15]–[19].
[28] *Yap Giau Beng Terence* v *Public Prosecutor* [1998] 2 SLR(R) 855 at [38].
[29] Keane and McKeown, above n. 26 at 595.
[30] See *Ramalingam Ravinthran* v *Attorney-General* [2012] 2 SLR 49; *Yong Vui Kong* v *Public Prosecutor* [2012] 2 SLR 872; *Quek Hock Lye* v *Public Prosecutor* [2012] 2 SLR 1012.

discretion. Third, even if the prosecution had exercised discretion improperly, the court can only make a declaration to that effect but it has no power to do anything else. In this regard, there is no precedent in which prosecutorial discretion has successfully been challenged, and s. 33B is also silent as to the consequence of successfully challenging the certification decision.

In light of all of this, some may take the view that it should be the court rather than the prosecution that decides if the courier had indeed rendered substantial assistance to the CNB, or alternatively, the threshold for certification should be lowered – for instance, to that of good faith cooperation.[31] However, both possibilities were firmly rejected by the Minister for Law during the parliamentary debates. With respect to the former, he said that this was a matter relating to 'operational information', which the prosecution has a better understanding of and also has a duty of confidence not to disclose.[32] With respect to the latter, he said it was not a realistic option as couriers may be 'primed' by the sophisticated syndicates with stories so as just to appear to cooperate.[33] It would seem then that ultimately, the Singapore government remains committed as ever in its crusade against drugs and sees no need to recalibrate the state-versus-individual dichotomy for criminal proceedings. In the words of the Minister for Law: 'The issue is not what we can do to help couriers avoid capital punishment. It is about what we can do to enhance the effectiveness of the [MDA] in a non-capricious and fair way without affecting our underlying fight against drugs.'[34]

[31] See also Second Reading of Misuse of Drugs (Amendment) Bill, *Singapore Parliament Reports*, 12 November 2012 (Edwin Tong): 'By definition, an accused trafficker who satisfies the criteria in [s. 33B] is likely to be a relatively low level transporter or assistant. That person is not likely to be in a position to give any substantive assistance especially if that assistance is to lead to some tangible disruption outcome … I wonder whether the threshold is not set too high. Such a requirement would likely disadvantage the offender who was sitting at the lower end of the hierarchy with little or no information on the senior members of the inner workings of the syndicate … It is possible that the assistance rendered or the information provided by the offender may either not be immediately or be fully appreciated. It is entirely possible that such information or assistance provided by the offender could be useless on its own but when put together with other pieces of information, obtained from other sources at other times, the fuller picture could well be very useful, and this may take several months or even years.'

[32] Second Reading of Misuse of Drugs (Amendment) Bill, *Singapore Parliament Reports*, 14 November 2012 (K Shanmugam).

[33] Ibid.

[34] Ibid.